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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. . . . .

STATE OF MICHIGAN,
Petitioner,

v.

LOREN TYLER and ROBERT TOMPKINS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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JURISDICTION

Petitioner bases jurisdiction upon 28 U.S.C. §1257 (3).

The Michigan Constitution prohibits unreasonable search and seizure. Mich. Const. Art. 1, §11. When the Michigan Supreme Court reversed the decision of the Michigan Court of Appeals, the court noted that the Court of Appeals had rejected Respondents' claims on

both the Fourth Amendment and the corresponding provision of Michigan's Constitution. *People* v. *Tyler*, 399 Mich. 564, 569 (1977). The Michigan Supreme Court has occasionally interpreted provisions in Michigan's constitution that parallel provisions in the federal constitution differently that the United States Supreme Court has interpreted the parallel federal guarantees. *People* v. *Turner*, 390 Mich. 7, 210 N.W. 2d 336 (1973). See also *People* v. *Tyler*, 399 Mich. 564, 570 fn. 7. Consequently, whether the United States Supreme Court has jurisdiction is unclear. The citation by Petitioner of *People* v. *Moore*, 291 Mich. 426, 216 N.W. 2d 770 (1970), is not relevant to the instant case. No narcotic drugs, firearms, bombs, explosives or other dangerous weapons were involved in the seizures in the instant case; thus the Michigan Supreme Court is free to impose a higher standard of reasonableness for these searches and seizures than the standard of reasonableness the United States Supreme Court has held that the Fourth Amendment requires.

As to the question of Respondent Tompkin's standing, this court does not have jurisdiction to review that question.

> "It is, of course, a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only to cases involving state substantive grounds, *Murdock* v. *City of Memphis* 20 Wall 590, but also in cases involving prodecural state grounds. Compare *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, with *Davis* v. *Wechsler*, 263 U.S. 22. But it is important to distinguish between state substantive grounds and state procedural grounds. Where the

ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the non-federal doctrine is necessary to avoid advisory opinions.

These justifications have no applications where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965).

Footnote seven in the *Tyler* opinion clearly indicates that exactly on point decisions of the United States Supreme Court do not foreclose the standing issue in Michigan state courts. 399 Mich. at 571. That is, the Michigan Supreme Court considers the issue of standing to be an issue of state law. Thus understood, the Michigan Supreme Court's refusal to consider the standing question was a decision to enforce state procedural rules to ban consideration of a state law question. Consequently, the United States Supreme Court has no jurisdiction to consider Question III of Petitioner's Questions Presented.

QUESTIONS PRESENTED

1. After fire officials have extinguished a fire and left the scene, may the fire officials or police officers thereafter conduct a warrantless search of the damaged premises?

STATEMENT OF THE CASE

This case arises out of a fire that occurred a few minutes before midnight on January 21, 1970. 399 Mich. at 570.

The fire department arrived at the scene shortly after midnight. While fighting the fire, the firemen discovered and seized certain evidence that was admitted at the trial; Responents do not challenge the admission of this evidence. 399 Mich. at 570.

At 4:00 a.m. on January 22, 1970, the firemen left the scene and the building was left unattended. 399 Mich. at 570.

At 8:00 a.m. on January 22, 1970 the fire chief and an asistant returned to collect evidence as part of a criminal investigation. 399 Mich. at 577. They entered the premises, conducted a search, and seized certain evidence that was admitted at Respondents' trial; by a timely motion and objections in the trial court, Respondents challenged the admission of this evidence. 399 Mich. at 570.

On February 16, 1970 a police sergeant entered the premises and seized certain evidence that was admitted at

Respondents' trial; by a timely motion and objections in the trial court, Respondents challenged the admission of this evidence. 399 Mich at 570.

The constitutionality of the challenged searches and seizures was the central question in the appeals to the Michigan Court of Appeals and the Michigan Supreme Court.

ARGUMENT

The holding of *People* v. *Tyler*, 399 Mich. 564 (1977), involves no substantial federal question.

Based on the facts stated above, the Michigan Supreme Court said:

> "While it may be no easy task under some circumstances to distinguish as a factual matter between an administrative inspection and a criminal investigation, in the instant case the court is not faced with that task. Having lawfully discovered the plastic container of flammable liquid and other evidence of arson before the fire was extinguished, Fire Chief See focused his attention on an assembling proof of arson and began a criminal investigation. At that point, there was probable cause for an issuance of a criminal investigative search warrant." 399 Mich. at 577.

Consequently, the Michigan Supreme Court was holding that an unconsented, warrantless search during a criminal investigation that is not justified by exigent circumstances, is illegal, and evidence for the search must be suppressed.

Petitioner argues that an exception to the warrant requirement should be established of fire damaged premises because respondents had little reasonable expectation of privacy in the premises. The Michigan Supreme Court explicitly rejected this contention of the facts of the present case.

> "We agree that a warrantless entry would not invade a constitutionally protected interest in privacy, if the owner or occupant of the burned premises abandoned the property or the premises are so completely destroyed that there no longer are recognizable objects of personal property. The record does not factually support a conclusion that Tyler had abandoned the fire damaged premises." 299 Mich. at 582-583.

As support for its conclusion, the Michigan Supreme Court noted that:

> "a warrant [is] required even if the investigation of a fire is to determine 'the cause of the fire under investigation' and does not 'place a person under criminal investigation.' "

This conclusion is obiter dictum but is unassailable.

Camara v. *Municipal Court*, 387 U.S. 523 (1967), held that a warrant is required to justify a routine annual inspection for housing code violations. The *Camara* court advanced three reasons for this conclusion. First, a strong policy exists that invasions of private property should be only after a warrant has been issued.

> "Nevertheless, one government principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private propery without proper consent is unreasonable unless it has been authorized by a valid search warrant." 287 U.S at 528-529.

Second, even though a search for a code violation is less hostile and intrusive than a search for evidence of a crime, the search nevertheless violates areas where persons have a justifiable expectation of privacy.

> "For instance, even the most law abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. 387 U.S. at 530-531.

Third, the government objectives could be achieved within the requirement that a search warrant be obtained. 387 U.S. at 533.

The reasons advanced in *Camara* in support of the decision all exist in the present case. The strong policy against warrantless searches remains. The type of seizure conducted does invade areas where persons have an expectation of privacy unless the person abandoned the property or the property is completely destroyed, neither of which exists in the instant case. 399 Mich at 582-583. Lastly, the government objective can be achieved although a search warrant is required for the administrative search. 399 Mich. at 578. Consequently, under *Camara* search warrants were needed even if the searches by the fire chief and police sergeant were administrative searches instead of criminal investigations.

CONCLUSION

While the Michigan Supreme Court relied on *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *Seattle*, 387 U.S. 541 (1967), to reach its holding, the result in *Tyler* is unaffected by those cases. As the Michigan Supreme Court noted, the record shows that government officials, to further a criminal investigation, made a search of property that Respondents had an interest of privacy in; the record shows no consent, no exigent circumstances. The Michigan Supreme Court then applied the rudimentary principle that absent consent or exigent circumstances, evidence from warrantless searches must be suppressed. Unless the United States Supreme Court is prepared to alter the fundamental premises of Fourth Amendment jurisprudence, this holding involves no substantial federal question.

Consequently the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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